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COMMONWEALTH COURT
OF PENNSYLVANIA
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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

ABRAHAM ATIYEH, *et al.*,
Petitioners

v.

COMMONWEALTH OF
PENNSYLVANIA, *et al.*,
Respondents

No. 312 M.D. 2012

**PRELIMINARY OBJECTIONS OF RESPONDENTS, THE COMMONWEALTH OF
PENNSYLVANIA, THE GOVERNOR, AND THE SECRETARY OF REVENUE, TO
PETITION FOR REVIEW**

Acting pursuant to Pa. R.A.P. 1516(b) and through their undersigned counsel, Respondents, the Commonwealth of Pennsylvania, the Governor and the Secretary of Revenue (“Answering Respondents”), respectfully assert preliminarily objections to the Petition for Review. In support of their preliminary objections, Answering Respondents state as follows:

BACKGROUND

1. Petitioners Abraham Atiyeh and Pennsylvania Venture Capital, Inc., on April 23, 2012, filed with this Court a Petition for Review challenging the constitutionality of Article XVI-B of The Fiscal Code (72 P.S. § 1601-B *et seq.*) under Pa. Const. art. III, § 32 (relating to special legislation), and Pa. Const. art. VIII, § 1 (relating to uniformity of taxation). A true and correct copy of the Petition for Review is attached hereto as Exhibit 1.

2. Petitioners bring suit as taxpayers of Bethlehem Township, Northampton County, and Whitehall Township, Lehigh County, respectively, and assert standing as such.

3. Article XVI-B of the Fiscal Code authorizes the establishment of a Neighborhood Improvement Zone (NIZ) within a city of the third class for the purpose of fostering economic improvement and development through the creation of certain public financing opportunities.

4. Petitioners aver that the City of Allentown ("City"), or a municipal authority created by the City, has established an NIZ within the City of Allentown under Article XVI-B of the Fiscal Code.

5. Answering Respondents have no power, duty or responsibility under Article XVI-B of the Fiscal Code respecting the establishment of an NIZ, and no Answering Respondent in fact took any action respecting the establishment of an NIZ within the City of Allentown.

6. The specific mechanism for improvement and development authorized by Article XVI-B is the development and construction of a sports facility or facility complex through public financing. *See* 72 P.S. § 1603-B.

7. The financing for the sports facility or facility complex is to be accomplished through the medium of a dedicated Neighborhood Improvement Zone Fund ("NIZ Fund") established within the State Treasury. 72 P.S. § 1604-B.

8. Among the revenue that is required by Article XVI-B to be deposited into the NIZ Fund are local earned income taxes (EITs) withheld by "qualified businesses" from individuals working within the NIZ.

9. Section 1604-B(b) of the Fiscal Code specifically requires "any entity" collecting a local EIT within the NIZ to submit to the State Treasurer all of the local taxes as calculated under that statutory provision for deposit in the NIZ Fund. 72 P.S. § 1604-B(b).

10. Under Article XVI-B of the Fiscal Code, no Answering Respondent is assigned any power or duty respecting the obligation of qualified businesses to submit to the State Treasurer local EITs collected within an NIZ or the disposition of the local EITs that are submitted.

11. The funds transferred to the NIZ Fund may be utilized only (i) for payment of debt service on bonds issued for the improvement and development of the NIZ and constructing a sports facility or facility complex, (ii) for payment of debt service on bonds issued to refund those bonds, (iii) to replenish amounts required in any debt service reserve funds established to pay debt service on bonds, and (iv) for payment of capital maintenance and improvement projects for a sports facility or facility complex. *See* 72 P.S. § 1604-B(e).

12. For the purpose of designating an NIZ and constructing a sports facility or facility complex, Article XVI-B of the Fiscal Code authorizes a city to designate or create a municipal authority to serve as the “contracting authority.” *See* 72 P.S. § 1602-B.

13. On information and belief, Answering Respondents aver that the Allentown Neighborhood Improvement Zone Development Authority (“NIZ Authority”), established by the City, is the designated contracting authority for the NIZ established in the City of Allentown.

14. Answering Respondents have no power, duty or responsibility respecting the NIZ Authority or the designation or operation of a contracting authority under Article XVI-B of the Fiscal Code.

15. The use of the NIZ Fund for its designated purposes is accomplished through an annual transfer of funds by the State Treasurer to the contracting authority, “until the bonds issued to finance and refinance the improvement and development of the [NIZ] and the construction of the facility or facility complex are retired.” 72 P.S. § 1604-B(d)(2).

16. In their Petition for Review, Petitioners have not included as a respondent the NIZ Authority or any other authority or entity that might be serving as the contracting authority under Article XVI-B of the Fiscal Code.

17. No Answering Respondent is assigned by Article XVI-B of the Fiscal Code a power or duty respecting the transfer of funds from the NIZ Fund to the contracting authority or the disposition of the transferred funds.

18. Petitioners claim that they are harmed by Article XVI-B because EITs withheld from residents of the townships of which Petitioners are taxpayers who earn income from qualified businesses within the NIZ are transferred to the NIZ Fund, rather than paid to their home townships.

19. No Answering Respondent is assigned by Article XVI-B of the Fiscal Code a power or duty respecting the withholding or disposition of EITs imposed by the Petitioner municipalities or any other local taxing authority.

FIRST PRELIMINARY OBJECTION – The Commonwealth of Pennsylvania is immune

20. Respondent Commonwealth of Pennsylvania is immune from suit.

21. Unlike suits to restrain officers of the Commonwealth from enforcing the provisions of a statute claimed to be unconstitutional, such suits against the Commonwealth – whether in equity or for declaratory judgment – are within the rule of immunity. *See Stackhouse v. Commonwealth*, 892 A.2d 54, 59 (Pa. Commw. Ct.), *appeal denied*, 588 Pa. 760, 903 A.2d 539 (2006).

WHEREFORE, Answering Respondents respectfully request this Honorable Court to sustain their preliminary objections and dismiss the Commonwealth of Pennsylvania as a respondent in this matter on the basis of sovereign immunity.

SECOND PRELIMINARY OBJECTION – The Governor is not a proper party

22. The Governor is not a proper party to this suit.

23. The Governor has no powers or duties under Article XVI-B of the Fiscal Code.

24. The Governor specifically has no powers, duties or responsibilities relating to the complaints made by Petitioners against Article XVI-B of the Fiscal Code or that are relevant to the equitable or injunctive relief sought by Petitioners.

25. The Governor is not a proper party to a suit solely on the basis that he (or, as in this case, a predecessor in the office of governor) has approved legislation presented to him by the General Assembly that is now claimed to be unconstitutional. *See Pa. Sch. Bds. Ass'n v. Commonwealth Ass'n of Sch. Adm'rs*, 696 A.2d 859, 868 (Pa. Commw. Ct. 1997) (The mere fact that the Governor gave final approval to legislation by signing it into law does not give him an interest that would be affected by an action seeking to have the legislation declared unconstitutional, nor does the Governor's absence from suit prevent the granting of appropriate relief in the event that the constitutional claim were sustained).

26. The Petition for Review states no claim properly made against the Governor, and the Governor is neither an indispensable nor necessary party to Petitioners' suit.

WHEREFORE, Answering Respondents respectfully request that this Honorable Court sustain their preliminary objections and dismiss the Governor as a respondent inasmuch as the

Petition for Review states no claim against the Governor, and the Governor is neither an indispensable nor necessary party to Petitioners' suit.

THIRD PRELIMINARY OBJECTION – The Petition for Review fails to state a claim for injunctive relief against Answering Respondents

27. Unlike the Governor, the Department of Revenue does have powers and duties under Article XVI-B of the Fiscal Code relating to State taxes. *See* 72 P.S. § 1604-B(a.I)(1)-(3), (b). Consequently, because a declaratory judgment sought by Petitioners that Article XVI-B of the Fiscal Code is unconstitutional special legislation under Pa. Const. art. III, § 32, would affect his statutory powers and duties, the Secretary of Revenue is a proper party to Petitioners' constitutional challenge to the statute under Count I of the Petition for Review and their request for *declaratory judgment*.

28. In addition to their request for a declaratory judgment that Article XVI-B is unconstitutional special legislation under Pa. Const. art. III, § 32, however, Petitioners also ask this Court (a) to direct State Officials not to divert EIT revenues to the NIZ Fund; and (2) to order the return of all EIT revenues affected by Article XVI-B of the Fiscal Code to local taxing authorities.

29. Like the Governor, the Secretary of Revenue has no powers, duties or responsibilities under Article XVI-B of the Fiscal Code relating to the claimed "diversion" of EIT revenues to the NIZ Fund.

30. In addition, like the Governor, the Secretary has no statutory responsibility respecting the administration of the NIZ Fund or the disposition of EIT revenue, nor does he have care, custody or control over the NIZ Fund. Such is the sole responsibility of the State Treasurer.

31. Because neither the Governor nor the Secretary of Revenue has any powers, duties or responsibilities under Article XVI-B of the Fiscal Code respecting the handling of EIT revenue or the administration of the NIZ Fund, there can be no basis in law for the Court to enter the injunctive relief requested by Petitioners directed to the Governor or the Secretary of Revenue.

WHEREFORE, Answering Respondents respectfully request this Honorable Court to sustain their preliminary objections and dismiss any claim for injunctive relief that is directed against them.

FOURTH PRELIMINARY OBJECTION – The Petition for Review fails to state a claim against Answering Respondents under Count II

32. In Count II of their Petition for Review, Petitioners claim that Article XVI-B of the Fiscal Code violates Article VIII, § 1 of the Constitution of Pennsylvania because (a) revenue generated through Petitioners' enactment of an EIT is "diverted and taken by the State for purposes other than the local purposes for which the EIT was imposed," and (b) Article XVI-B "effectively taxes EIT revenues without identifying the parties upon whom the 'tax' is to be levied, nor the effective tax rate." Pet. at ¶¶ 80-81. This form of "taxation," Petitioners contend, "lacks uniformity" as required by Pa. Const. art. VIII, § 1. *Id.* at ¶¶ 82-84.

33. As described in the preceding paragraphs of these preliminary objections, Answering Respondents have no responsibility under Article XVI-B respecting the statute's directions regarding EIT revenue.

34. Consequently, as a matter of law, Count II of the Petition for Review fails to state a claim against Answering Respondents.

WHEREFORE, Answering Respondents respectfully request that this Honorable Court sustain their preliminary objections and dismiss Count II of the Petition for Review as it relates to them.

FIFTH PRELIMINARY OBJECTION – Petitioners have failed to join indispensable parties

35. “Generally, an indispensable party is one whose rights are so connected with the claims of the litigants that no relief can be granted without infringing upon those rights.” *Annenberg v. Commonwealth*, 686 A.2d 1380, 1384 (Pa. Commw. Ct. 1996). In addition, “when declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration.” 42 Pa.C.S. § 7540(a).

36. As described in preceding paragraphs of these preliminary objections, Article XVI-B of the Fiscal Code assigns to the “contracting authority” designated by the city principal governmental responsibilities under the statute, including the most important powers and duties relevant to the claims made by Petitioners.

37. In a challenge such as this one to the constitutionality of Article XVI-B of the Fiscal Code, the contracting party is an indispensable party without whose presence the Court lacks jurisdiction.

38. Under Article XVI-B, the contracting authority’s powers and duties include the following:

- To designate a neighborhood improvement zone for the purposes of neighborhood improvement and development within the city. *See* 72 P.S. § 1602-B (defining NIZ); 72 P.S. § 1603-B (“The contracting authority may designate a

neighborhood improvement zone of not greater than 130 acres in which a facility or facility complex may be constructed.”).

- To borrow funds for the purpose of improvement and development within the NIZ and construction of a facility or facility complex within the zone. *See* 72 P.S. § 1603-B.
- Annually, to receive from the State Treasurer a transfer from the NIZ Fund until the bonds issued to finance and refinance the improvement and development of the NIZ and the construction of the facility or facility complex are retired. *See* 72 P.S. § 1604-B(d)(2).

39. Under Article XVI-B of the Fiscal Code, the EIT revenues that are the subject of Petitioners’ suit are required to be deposited by the State Treasurer into the NIZ Fund. *See* 72 P.S. § 1604-B(h), (d)(1).

40. Because only the contracting authority receives payments from the NIZ Fund under Article XVI-B of the Fiscal Code, it is the contracting authority alone that ultimately receives and disposes of the EIT revenues about which Petitioners complain in their Petition for Review.

41. On information and belief, Answering Respondents aver that the contracting authority for the City of Allentown is the Allentown Neighborhood Improvement Zone Development Authority (“NIZ Authority”).

42. Because of the central governmental role played by the contracting authority under Article XVI-B of the Fiscal Code – especially relating to the EIT revenues at issue in this suit – the NIZ Authority is an indispensable party. *See Wagaman v. Attorney General*, 872 A.2d

244, 247 (Pa. Commw. Ct. 2005) (governmental entity or official having powers or duties with respect to a challenged law's enforcement or administration is an indispensable party).

WHEREFORE, Answering Respondents respectfully request that this Honorable Court sustain their preliminary objections and dismiss this action for failure to join all indispensable parties.

SIXTH PRELIMINARY OBJECTION—Petitioners lack standing

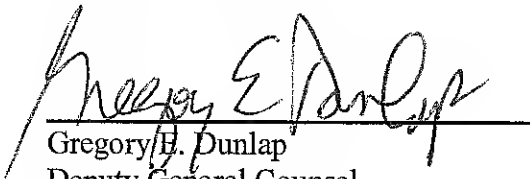
43. Petitioners claim that they have standing as taxpayers because Article XVI-B of the Fiscal Code causes revenue from EITs that are levied by their home townships and other municipalities in which the corporate petitioner does business to be diverted from the municipalities in which they pay taxes and do business to the NIZ Fund to be used for the purposes designated by the statute.

44. “A taxpayer has standing to challenge an act only if: (1) the governmental action would otherwise go unchallenged; (2) those directly and immediately affected by the complained-of matter are beneficially affected and not inclined to challenge the action; (3) judicial relief is appropriate; (4) redress through other channels is unavailable; and (5) no other persons are better situated to assert the claim.” *Stilp v. Commonwealth*, 596 Pa. 62, 72-73, 940 A.2d 1227, 1233 (2007).

45. Petitioners lack taxpayer standing to challenge Article XVI-B of the Fiscal Code as it relates to the diversion of EIT revenue of which Petitioners complain because those directly and immediately affected by the statute's treatment of EIT revenue – the local taxing authorities whose revenue is diverted – are aggrieved and have challenged the statute. *See Hanover Twp., et al. v. Com. of Pa., et al.*, No. 281 M.D. 2012; and *Borough of Catasauqua, et al. v. Com. of Pa., et al.*, No. 360 M.D. 2012.

WHEREFORE, Answering Respondents respectfully request that this Honorable Court sustain their preliminary objections and dismiss this action for lack of standing.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Gregory E. Dunlap", is written over a horizontal line.

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DATE: May 25, 2012

EXHIBIT 1

**(This Exhibit – Petition for Review –
is being omitted from the service
copies, but is available upon request.)**

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No. 312 M.D. 2012

CERTIFICATE OF SERVICE

Gregory E. Dunlap, Deputy General Counsel, hereby certifies that, on this date, I served the foregoing **Preliminary Objections of Respondents, the Commonwealth of Pennsylvania, the Governor, and the Secretary of Revenue, to Petition for Review**, by causing a copy of the same to be deposited in the Commonwealth's inter-office mail service or deposited in the United States mail, first-class, postage prepaid, at Harrisburg, Pennsylvania, addressed to the following:

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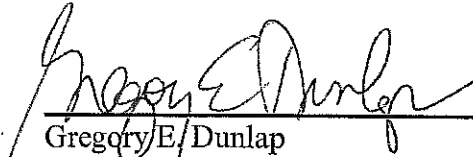
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DATE: May 25, 2012